(1)

Supreme Court, U.S.
FILED

[redacted] 01 787 NOV 19 2001

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

FRANCES L. RAMBACHER & GARY L. RAMBACHER,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,

Respondent.

On Petition for a Writ of Ceriorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

FRANCES L. RAMBACHER
GARY L. RAMBACHER
1208 Apache Trail
Ironton, Ohio 45638
(740) 532-5544

1983

39 pp

Questions Presented

1. Whether the law (IRS's own written regulation) on reasonable cause will be recognized and honored? (law & legal opinion App. A&B)

2. Whether the IRS's intentional incorrect pertinent statement to and quoted by the Circuit in app G on the reasonable cause law will be addressed and the current decision corrected?

3. Whether citizens' correct contentions in App. C (including special circumstances) which the 6th Circuit panel states in App. D were considered, be at least addressed by the system in reviewable decisions (listing, explanation and rationale), so the administrative and judicial decisions will not be arbitrary?

4. Whether the major breakdown in the administrative and judicial system will be addressed and corrected, including the circuit states that it considered that none of the citizens' contentions were ever addressed (including special circumstances)? (App. C&D)

5. Whether citizens should be able to expect that their contentions will be addressed (not only considered), when dealing with the government so the administrative and judicial decisions will not be arbitrary?

PARTIES TO THE PROCEEDING

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II. Citizens' correct contentions should be addressed (not only considered) so decisions are not arbitrary.

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Harberson v NLRB, 810 F.2d 977, 984(10h Cir. 1987)
(citing SEC v. Chenery Corp., 318 U.S. 80,94 (1943)).
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Public Service Co. Of New Mexico v. FERC,
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(quoting Harborlite Corp. V. ICC,
613 F.2d 1088, 1092 (D.C. Cir. 1979)). 45a

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Statutes
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Treas. Reg. &1.6661-3(a)(2) . . . . . .
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Frances L. Rambacher and Gary L. Rambacher respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals panel for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is at App. D, E & G. The opinion of the tax court is at (App. F).

Petitioners' administrative waiver-abatement request which the IRS refused explanation for a starting point is with the 6th circuit brief.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals panel was entered on February 5, 2001, and a timely petition for rehearing with suggestion for rehearing en banc was denied on June 22, 2001. An application for extension of time to file petition for writ of certiorari was granted to November 19, 2001.

STATUTORY PROVISION
REGULATION (App A&B "DNA" legal opinion adopted by reference)

1. **Arguable case (over 9 years) safe harbor** ***"that is arguable but fairly unlikely to prevail in court would satisfy a reasonable basis standard, but not the substantial authority standard." IRS's written regulation 1.6661-3(a)(2).

2. **More likely than not placement legal opinion safe harbor**.

"The substantial authority standard is less stringent than a "more likely than not" standard (that is, a greater than 50-percent likelihood of being upheld in litigation), but stricter than a reasonable basis standard (the standard which, in general, will prevent imposition of the penalty under section 6653 (a), relating to negligence or intentional disregard of rules and regulations)." IRS's written regulation 1.6661-3(a)(2).

STATEMENT OF THE CASE

The case deals with matters of national importance:

1. Whether the law (IRS's own written regulation) on reasonable cause will be recognized and honored? (law & legal opinion adopted by reference App. A&B)

2. Whether the IRS's intentional incorrect pertinent statement to and quoted by the Circuit in app G on the reasonable cause law will be addressed and the current decision corrected?

3. Whether citizens' correct contentions in App. C (including special circumstances) which the 6th Circuit panel states in App. D were considered, be at least addressed by the system in reviewable decisions (listing, explanation and rationale), so the administrative and judicial decisions will not be arbitrary?

4. Whether the major breakdown in the administrative and judicial system will be addressed and corrected, including the circuit states that it considered that none of the citizens' contentions were ever addressed (including special circumstances)? (App. C&D)

5. Whether citizens should be able to expect that their contentions will be addressed (not only considered), when dealing with the government so the administrative and judicial decisions will not be arbitrary?

The special circumstances in app C, which were finally acknowledged by the system in app D which arbitarily have not been addressed in reviewable decisions, clearly show that an unreasonable negligence penalty of $6,000 (2 times) should not be charged on a tax assessment of $2,700.

The taxpayers invested a small amount $6,250 in each year 1982 and 1983 in national partnerships with economic investment tax credit based on national publishers' sale price of book properties which the IRS intentional incorrectly represented over the years as bonafide and the only question was profit motive.

REASONS FOR GRANTING THE WRIT

The petition should be granted because the opinion below is wrong and:

(1) it does not recognize and honor the law (law & legal opinion listing 2 significant errors, App A&B),

(2) the IRS's intentional incorrect pertinent statement to and quoted by the circuit that the law does not pertain to reasonable cause should be corrected,

(3) it recognized in app C&D that none of the citizens' contentions were ever addressed (including special circumstances),

(4) the major breakdown in the administrative and judicial system should be addressed and corrected so citizens will have their contentions addressed in a reviewable form so administrative and judicial decisions will not be arbitrary,

(5) Citizens should be able to expect that their contentions will be addressed including rationale (not consideration only), when dealing with the government.

In this case the law, safe harbors regulation which the IRS wrote and denied to the court the regulation, pertains to negligence reasonable cause, circuit cases, IRS's representations, 3 law firms, the Tax Court's conditional delayed decision date and missed final date, the unknown alternative final decision date certain, procedures and IRS administrative abatement request have not been addressed due to the system's refusal.

The system's late quoting of the allowable 49% of the national partnership "more likely than not" legal opinion incorrectly as the 50% while refusing to address the 50% is not addressing citizens' contentions.

It is really appalling that none of the citizens' contentions starting at the abatement request were ever addressed.

Without question, a negligence penalty should not be charged in this case due to reasonable cause standard, even on the safe harbors only. Yet that is what the system has done.

CONCLUSION

Without question it would be a govenment abuse of power to charge a negligence penalty due to the law--arguable partnership case (over 9 years) and the "more likely than not" placement legal opinion law safe harbors, both of which satisfy reasonable basis.

Also, a negligence penalty should not be charged as the system has refused for obvious reasons to address (listing, explanation, rationale) the citizens' contentions so the administrative and judicial decisions will not be arbitrary. The petition for writ of certiorari should be granted.

Respectfully submitted,

Frances L. Rambacher

Gary L. Rambacher
Petitioners
1208 Apache Trail
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(740) 532-5544

APPENDIX

APPENDIX A

LAW-SAFE HARBORS

Safe Harbors against negligence penalty:

1. Arguable case (over 9 years) safe harbor.

"Thus, a position with respect to the tax treatment of an item that is arguable but fairly unlikely to prevail in court would satisfy a reasonable basis standard, but not the substantial authority standard." IRS's written regulation 1.6661-3(a)(2).

2. More likely than not legal placement opinion safe harbor.

"The substantial authority standard is less stringent than a "more likely than not" standard (that is, a greater than 50-percent likelihood of being upheld in litigation), but stricter than a reasonable basis standard (the standard which, in general, will prevent imposition of the penalty under section 6653 (a), relating to negligence or intentional disregard of rules and regulations)." IRS's written regulation 1.6661-3(a)(2).

Note: IRS's false statement. Warranted Special Circumstances. Obviously-inexplicably, the IRS's pertinent statement to and quoted by the 6th Circuit in its decision//98-1792 that the safe harbors do not pertain to negligence is false. The decision needs to be addressed and corrected.

Also for reference see IRS' 9th Circuit Balboa Energy Fund, et al v. Comm. 1981, et al, Docket No. 94-70260 decision of February 28,1996 per curiare, replacing the January 19, 1996 opinion 77AFTR2d Par. 96-540 (9th Cir., 1996), reversing the Tax Court, 13686-87, on negligence and understatement of tax penalties.

APPENDIX B

LEGAL OPINION

Bruce W. Powell
Attorney at Law
772 South Front Street
Columbus, OH 43206=1908
Telephone (614) 444-4445
Fax (614) 444-4447

October 27, 2001

Gary L. Ramhacher
1208 Apache Trail
Ironton, OH 45638

Dear Mr. Rambacher:

I have reviewed the 6th Circuit Federal Court of Appeals case opinion, Frances L. and Gary L. Rambacher v. Internal Revenue Service, 98-1792 for tax year 1981 involving IRC Sec. 6653(a1) & (2) penalties (negligence penalties).

In my opinion, the decision embodies two significant errors. First the Court stated, "Further, petitioners' claim that a safe harbor provision contained in 26 U.S.C.section 6661 (repealed 1989) precludes imposition of negligence penalties was not asserted in the Tax Court and will not be considered in the first instance on appeal."

The issue in the Tax Court was whether or not the negligence penalty applies, which issue was clearly raised by the petitioner in the Tax Court proceeding and axiomatically is not a new issue on appeal.

The safe harbor provisions are statutory and the regulations hereunder are binding on both taxpayers and the

government. As such, they describe a standard by which conduct can be measured. The omission of a reference to such standard in the court below does not create a "new issue" upon appeal. It means instead that the Tax Court did not apply the correct standard, which resulted in an error that should be correctable upon appeal.

The second error involves the statement, "Moreover, the government also correctly notes that the cited provision dealt solely with additions to tax for substantial understatement of tax, which are not at issue in this case,"

The court's error in this regard is to assume that the "safe harbor" regulation promulgated under the substantial understatement of tax penalty does not apply to the negligence penalty. Unfortunately, this decision appears to be diametrically opposite to the Commissioner's intent in promulgating such regulations. The pre 1989 penalties, as enacted by Congress, were to give taxpayers some guidance to know what reasonable steps they need take to avoid the various penalties. The Commissioner's promulgated regulations concerning the safe harbor standards under the statute having to do with substantial understatement of penalties. Despite the 6th Circuit Court's ruling, the cited regulations clearly apply to fraud penalties, underpayment penalties, and negligence penalties, denoting an ascending standard of strictness. The regulations clearly indicate that if a taxpayer reasonably relied upon a legal opinion, and if the opinion uses a "more likely than not' opinion as to the tax effects of a proposed transaction, then the taxpayer should have a "safe harbor" from the negligence penalty.

Accordingly, I believe the Court is incorrect in not allowing the taxpayers to demonstrate that such safe haven applied to them.

Yours very truly,

s/Bruce W. Powell
Bruce W. Powell

BWP/ps

APPENDIX C
REHEARING REQUEST

RECEIVED
MAR 23 2001
LEONARD GREEN, Clerk
Clerk

FILED
MAR 2 9 2001
LEONARD GREEN,

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANCES L. RAMBACHER AND)
L. RAMBACHER, Petitioners
-Appellants,

VS. No.00-1515

COMMISSIONER OF INTERNAL
REVENUE,

SUGGESTION FOR
REHEARING EN BANC

Respondent-Appellee.

The proceeding involves one or more questions of exceptional importance--taxpayers and citizens' rights.

IRS's false statements, Law, Regulations,and Circuit Cases have been ignored and not addressed regarding reasonable cause.

Special circumstances warrant the reversal of the Tax Court decision. None of the taxpayers' 1996 administrative abatement request and other timely contentions have been

addressed, which the IRS refused to discuss.

The Tax Court adopted the IRS' too little, too late post trial incorrect tainted only explanation which quoted the allowable 49% legal placement opinion falsely as the 50% conclusion while refusing to address the unambiguous 50% more likely than not legal opinion, three law firms and the IRS false representation over the many years of the partnerships being bonafide (which did over 20% of the nation's book industry business).

The petitioners-taxpayers respectfully request relief and justice as:

1. None of their timely contentions were ever addressed.
2. The taxpayers did not receive a full and fair trial or response to their timely administrative abatement request and other contentions.

2

3. The IRS late explanation in taxpayers 1981 adopted by the tax court refused to address the 50% portion of the legal opinion, the 3 law firms, the IRS false- misleading representations over the years. Quoting the allowable 49% as the 50% is not addressing the 50%.
4. **Most important**, the IRS' false pertinent statement to and quoted by the 6th Circuit in the taxpayers 1981 opinion that the safe harbors do not apply to negligence has not been addressed.
5. Each IRS safe harbor regulation, arguable case (over 9 years) and placement legal opinions, does apply to and protect taxpayers from negligence penalties.
6. The Tax Court rather than address the contentions

which could correct open taxpayers 1981 reneged on its statement in taxpayers 1983 by issuing a show cause order after stating the taxpayers would not be hurt or lose any rights by the court delaying the release of its decision.

7. The same 6th Circuit Judge (Merritt, conflict of interest for a fair hearing) was asssigned to taxpayers 1983 without notice for objection, even after the court's office said different judges would be assigned.

8. The 6th Circuit panel denied oral arguments requests without notice for objection.

9. **Important**, no certain date and rationale have been defined by the 6th Circuit panel for the tax court refusing to address contentions since the Tax Court opinion stated required date of "December 28, 1999" as being final judgment was missed for estoppel and issue preclusion.

10. Inexplicably, the IRS never disclosed that the IRS will abate erroneous charges, will protect taxpayers rights Pub 1, the safe harbors, the circuit cases, circuit case law fundamental rights, and

IRC Section 6402(j) rights codification:

"EXPLANATION OF REASON FOR REFUND DISALLOWANCE--In the case of a disallowance of a claim for refund, the Secretary shall provide the taxpayer with an explanation for such disallowance."

APPENDIX C (CONT)
REHEARING REQUEST

Conclusion

The Tax Court tainted incorrect decision should be reversed due to special circumstances and the Tax Court's missed date.

Otherwise, please address the special circumstances of the IRS' false statements, the missed date, and the taxpayers other timely ignored contentions of law, regulations, arguable case and placement legal opinion safe harbors, circuit cases, taxpayers' rights, allowable 49%, abatement request, etc. which clearly show reasonable cause.

Also, please address the Tax Court's statement that the taxpayers would not lose any rights, conflict of interest and denial of oral arguments without notice.

For the government to refuse to discuss and ignore contentions and what is right is not right.

If taxpayers do not have the right to have their contentions addressed and their rights protected by the IRS, please explain.

Respectfully submitted,

s Frances L. Rambacher
Frances L. Rambacher

s Gary L. Rambacher
Gary L. Rambacher
Petitioners
1208 Apache Trail
Ironton, Ohio 45638
(740) 532-5544
March 21 , 2001

APPENDIX C (CONT)
REHEARING REQUEST

RECEIVED

MAR 2 3 2001

LEONARD GREEN, Clerk

IN THE UNITED STATES COURT OF
FOR THE SIXTH CIRCUIT

FRANCES L. RAMBACHER AND)
GARY L. RAMBACHER)
Petitioners-Appellants,)
VS.) No.98-1792
)
COMMISSIONER OF INTERNAL) MOTION
FOR ADDRESSING IRS'
REVENUE,)PERTINENT FALSE
STATEMENT
)
Respondent-Appellee.)

SECOND REQUEST - JULY 21, 2001

The taxpayers respectfully request that the IRS's pertinent false statement on safe harbors of arguable case (over 9 years) and placement tax opinion quoted by the 6th Circuit for 1981 be addressed and the Tax Court Opinion be reversed. Notice of the false statement was brought timely before the 6th Circuit in Gary L. Rambacher, No. 00-1515 for 1983 which is before the Circuit and needs to be addressed due to its seriousness. 1981 No. 98-1792 became final in November 2000 Supreme Court rehearing denied. However, the 6th Circuit and the Supreme Court have not

addressed the serious pertinent false statement included in the 6th Circuit opinion.

Respectfully submitted,

s Frances L. Rambacher
Frances L. Rambacher

s Gary L. Rambacher
Gary L. Rambacher
Petitioners
1208 Apache Trail
Ironton, Ohio 45638
(740) 532-5544
March 21 ,2001

Certficate of Service

It is herby certified that service of the foregoing motion has been made on the appellee on March 21, 2001, by mailing a copy thereof in an envelope properly addressed as follows:

Appellate Section

APPENDIX C (CONT)
REHEARING REQUEST

Department of Justice
PO Box 502
Washington, DC 20044

s Frances L. Rambacher
Frances L. Rambacher

s Gary L. Rambacher
Gary L. Rambacher

March 21, 2001

APPENDIX D
REHEARING RESPONSE

00-1515

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANCES L. RAMBACHER, ET AL., **FILED**

Petitioners-Appellants, **JUN 22 2001**
LEONARD GREEN, Clerk

V. ORDER

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

BEFORE: MERRITT and COLE, Circuit Judges; and HOOD,' District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s Leonard Green
Leonard Green, Clerk

'Hon. Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

APPENDIX E

FILED
FEB 5 2001
LEONARD GREEN, Clerk

No. 00-1515

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRANCES L. RAMBACHER,
GARY L. RAMBACHER,

ORDER

Petitioners -Appellants,

V.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

NOT RECOMMENDED FOR FULL-TEXT PUBUCATION

Sixth Circuit Rule 28(g) limits citation Io specific situations. **Please see Rule** 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

Before: MERRITT and COLE, Circuit Judges; HOOD, District Judge.*

Frances L. Rambacher and Gary L. Rambacher, proceeding pro se, appeal a tax court judgment denying their petition for redetermination of deficiencies determined by the Commissioner of Internal Revenue (Commissioner) filed pursuant to I.R.C. § 7442. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

The taxpayers petitioned the tax court for a redetermination of deficiencies determined by the Commissioner with respect to the penalty imposed for their 1983 tax year. Upon review, the court concluded that the taxpayers' arguments were barred by the doctrine of collateral estoppel (issue preclusion). The taxpayers have filed a timely appeal, essentially reasserting their argument. They also argue that the tax court's decision conflicts with two court of appeals' decisions.

*The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Upon review, we conclude that the tax court properly determined that the Rambachers are collaterally estopped from challenging the Commissioner's determination that they are liable for additions to tax for 1983.'s arguments are barred by the principles of issue preclusion. *See Bills v. Aseltine*, 52 F.3d 596, 604 (6th Cir. 1995). The doctrine of collateral estoppel bars relitigation of issues actually litigated and determined in an earlier action. *See Kane v. Magna Mixer Co.*, 71 F.3d 555,560 (6th Cir. 1995). Under collateral estoppel or issue preclusion, a prior decision on an issue of law necessary to a judgment, made by a court of competent jurisdiction, is conclusive in subsequent cases involving any party to the prior litigation, even if the new case is based on a different cause of action. *See United States v. Mendoza*, 464 U.S. 154, 158-59 (1984); *Bills, 52* F.3d at 604.

The taxpayers' arguments are barred by the principles of collateral estoppel. In 1996, the taxpayers filed two petitions in the tax court, one with regard to additions to tax determined against them for the 1981 tax year and one concerning an addition to tax determined against them for their 1983 tax year. In 1998, the tax court concluded that the taxpayers were negligent in claiming losses and investment tax credits in connection with their investment in the Series 98 and 124 limited partnerships, and the court affirmed the Commissioner's determination concerning the taxpayers' 1981 tax year. *See Rambacher v. Commissioner*, 75 T.C.M. (CCH) 2077 (1998), *aff'd unpublished opinion*, 194 F.3d 1313 (1999), *cert denied*, 2000 WL 655755 (June

19, 2000) *(Rambacher I)*. Hence, the issue of the taxpayer's negligence was actually litigated in *Rambacher I*, and the taxpayers had a full and fair opportunity to litigate the issue of their negligence. Moreover, the taxpayers' negligence was essential to *Rambacher I* as the taxpayers' negligence was the sole subject of that decision. Thus, the taxpayers are collaterally estopped from contesting the additions to tax determined against them for 1983, because the issues in the taxpayers' 1981 and 1983 cases are identical (i.e., whether the taxpayers were negligent in claiming losses and investment tax credits in connection with their investment in the Series 98 and 124 limited partnerships).

The taxpayers' argument that the tax court's decision is contrary to two court of appeals' decisions is also precluded. Once an issue is raised and decided, it is the entire issue that is precluded, not just the particular arguments raised in support of it in the first case. *See Yamaha Corp. of Am. v. United States*, 961 F.2d 245,254 (D.C. Cir. 1992). Hence, the taxpayers are barred from arguing that they were not negligent in filing their 1983 tax return.

Accordingly, we affirm the tax court's judgment. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Clerk

United States Tax Court
FRANCES L. AND GARY L. RAMBACHER,
Petitioners
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 11444-96
Date of Decision: February 4, 2000
Judge: Goldberg, Stanley J.

UNITED STATES TAX COURT

Filed February 4, 2000

Frances L. and Gary L. Rambacher, pro sese.

Andrew M. Winkler, for respondent.

MEMORANDUM OPINION
[1] GOLDBERG, SPECIAL TRIAL JUDGE: Respondent determined additions to petitioners' Federal income tax for the 1983 taxable year of $138 pursuant to section 6653(a)(1) and for 50 percent of the interest on $2,757, the part of the underpayment due to negligence pursuant to section 6653(a)(2). Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the year in issue, and all Rule references are to

the Tax Court Rules of Practice and Procedure.
[2] The issue for decision is whether petitioners are liable for additions to tax for negligence or intentional disregard of rules or regulations pursuant to section 6653(a)(1) and section 6653(a)(2) for the 1983 taxable year.
[3] This case was submitted fully stipulated pursuant to Rule 122. The stipulation of facts and the attached exhibits are incorporated herein by this reference. At the time that they filed their petition, petitioners resided in Ironton, Ohio.
[4] On February 17, 1995, this Court entered a stipulated decision in the underlying partnership proceeding, Anderson Equip. Associates v. Commissioner, at docket No. 27745-89. Pursuant to section 7481, that decision became final on May 18, 1995, and thereafter respondent assessed taxes against petitioners for the 1981, 1982, 1983, and 1984 taxable years as computational adjustments. The deficiency in the instant case is attributable to adjustments in the underlying partnership proceedings which resulted in automatic adjustments to petitioners' income pursuant to the provisions of the Tax Equity & Fiscal Responsibility Act of 1982, Pub. L. 97-248, 96 Stat. 324.
[5] On March 5, 1996, respondent issued a notice of deficiency to petitioners for the 1981 taxable year. The question of petitioners' liability for negligence for 1981 was decided by this Court in the case of Rambacher v. Commissioner, T.C. Memo. 1998-124, affd. without published opinion 194 F.3d 1313 (6th Cir. 1999)(Rambacher I). /1/ Petitioners were found liable for

the additions to tax pursuant to sections 6653(a)(1) and (2) for 1981. Pursuant to section 7481(a)(2)(A), the decision in Rambacher I became final on December 28, 1999, the date on which the time allowed for filing a petition for a writ of certiorari with the U.S. Supreme Court expired. /2/

[6] In the instant case, respondent, in a notice of deficiency dated March 5, 1996, determined that petitioners were liable for additions to tax pursuant to section 6653(a)(1) and section 6653(a)(2) for the 1983 tax year.

[7] Section 6653(a)(1) provides for an addition to tax equal to 5 percent of any underpayment if any part of the underpayment is due to negligence or intentional disregard of rules or regulations. Section 6653(a)(2) provides for an addition to tax in the amount of 50 percent of the interest payable on the portion of any underpayment of tax which is attributable to negligence or intentional disregard of rules or regulations.

[8] In their petition, petitioners contend: (1) Petitioners were not negligent or did not intentionally disregard rules and regulations; (2) the Internal Revenue Service (IRS) did not respond to petitioners' request to inform petitioners as to how the IRS made its negligence determination; and (3) that the statute of limitations bars respondent's action in this matter. /3/

[9] Petitioners concede that the issue in this case is identical to the issue in Rambacher I and have stipulated that record into this case. Since the issue decided by Rambacher I is identical to the issue in this case, we

issued an Order to Show Cause (order) on November 16, 1999, asking petitioners to demonstrate why this case should not be decided on the same grounds as Rambacher I. Petitioners' response to the order was filed with this Court on December 16, 1999.

[10] The doctrine of collateral estoppel, sometimes called issue preclusion, generally "applies to tax proceedings involving similar claims containing the same legal points, or different tax years, when there has been no change in the controlling facts or applicable legal principles." Continental Oil Co. v. Jones, 80 F. Supp. 340, 343 (W.D. Okla. 1948), affd. 176 F.2d 519 (10(th) Cir. 1949); see also Commissioner v. Sunnen, 333 U.S. 591, 598- 599 (1948). Collateral estoppel has "the dual purpose of protecting litigants from the burden of relitigating an identical issue and of promoting judicial economy by preventing unnecessary or redundant litigation." Meier v. Commissioner, 91 T.C. 273, 282 (1988).

[11] In Montana v. United States, 440 U.S. 147, 155 (1979), the Supreme Court established the following three-prong test for applying collateral estoppel: (1) The issue presented in the subsequent litigation is in substance the same as the issue presented in the first case; (2) the controlling facts or legal principles have not changed significantly since the first judgment; and (3) **special circumstances do not warrant an exception to the normal rules of preclusion.**

[12] Building on the Supreme Court's analysis in Montana, this Court has identified five criteria that must be satisfied for collateral estoppel to apply. They are: (1)

The issue in the second suit must be identical in all respects with the one decided in the first suit; (2) **there must be a final judgment rendered by a court of competent jurisdiction**; (3) collateral estoppel may only be invoked against parties and their privies to the prior judgment; (4) the parties must have actually litigated the issue and the resolution of the issue must have been essential to the prior decision; and (5) the controlling facts and applicable legal rules must remain unchanged from those in the prior litigation. See Peck v. Commissioner, 90 T.C. 162, 166-167 (1988), affd. 904 F.2d 525 (9th Cir. 1990).

[13] On the basis of the record, we find that all five conditions have been satisfied in the instant case, and, pursuant to the doctrine of collateral estoppel, find that the holding in Rambacher I is controlling here. We therefore hold that petitioners are liable for the additions to tax pursuant to sections 6653(a)(1) and (2) for the 1983 taxable year.

[14] To reflect the foregoing,

[15] An appropriate order and decision will be entered.

FOOTNOTES

/1/ The order of the Court of Appeals for the Sixth Circuit lists petitioner wife as "Francis L. Rambacher" in the case caption. The unpublished order was entered on Sept. 28, 1999.

/2/ Rule 13, Rules of the Supreme Court of the United States, provides that a petition for a writ of certiorari is timely when filed within 90 days after entry of the judgment.

/3/ Petitioners now concede that the statute of limitations does not bar an assessment with respect to the 1983 tax year.

APPENDIX G
1981

Rambacher, 6th Cir 9/28/99 Decision **FINAL 11/13/00**
See Pertinent Pages 24a, 25a

No. 98-1792

United States Court of Appeals
for the Sixth Circuit

FRANCIS L. RAMBACHER, GARY L. RAMBACHER,
Petitioners-Appellants,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Docket No. 98-1792
Date of Decision: September 28, 1999
Judge: per curiam

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ORDER

Before: Merritt and Clay, Circuit Judges; Wiseman, District Judge. /*/

Rambacher, 6th Cir 9/28/99 Decision **FINAL 11/13/00**
See Pertinent Pages 24a, 25a

[1] Francis L. and Gary L. Rambacher appeal a Tax Court determination that they are liable for negligence penalties imposed pursuant to 26 U.S.C. section 6653(a)(1) & (2) as a result of their investment in a sham tax shelter. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

[2] By counsel, Mr. and Mrs. Rambacher filed a petition in the Tax Court for a redetermination of additions to tax totaling $2,692 as determined by the Commissioner for the tax year 1981. The government filed an answer, and the parties filed pretrial briefs. A trial was conducted before the Tax Court in 1997 at which only Mr. Rambacher testified. After further briefing, the Tax Court affirmed the Commissioner's determination in all respects. This timely appeal followed.

[3] On appeal, counsel for petitioners has withdrawn, and petitioners are proceeding pro se. In their brief on appeal, petitioners contend that: (1) a safe harbor provision precludes imposition of negligence penalties; (2) negligence penalties are improper because they acted in good faith; and (3) the Internal Revenue Service IRS did not act on their request for an abatement of the negligence penalties or otherwise explain its refusal to abate the penalties. The government responds that the Tax Court did not clearly err in its determination that petitioners were negligent.

Rambacher, 6th Cir 9/28/99 Decision **FINAL 11/13/00**
See Pertinent Pages 24a, 25a

[4] Upon consideration, we conclude that the Tax Court did not clearly err in its determination that petitioners were negligent for the reasons stated in its memorandum opinion filed March 30, 1998. See Pasternak v. Commissioner, 990 F.2d 893, 902 (6th Cir. 1993); Illes v. Commissioner, 982 F.2d 163, 166 (6th Cir. 1992) (per curiam), cert. denied, 507 U.S. 984 (1993); Leuhsler v. Commissioner, 963 F.2d 907, 910 (6th Cir. 1992). Further, petitioners' claim that a safe harbor provision contained in 26 U.S.C. section 6661 (repealed 1989) precludes imposition of negligence penalties was not asserted in the Tax Court and will not be considered in the first instance on appeal. See Enertech Elec., Inc. v.
Mahoning County Comm'rs, 85 F.3d 257, 261 (6th Cir. 1996). Moreover, the government also correctly notes that the cited provision dealt solely with additions to tax for substantial understatement of tax, which are not at issue in this case. See Illes, 962 F.2d at 167. Finally, petitioners' contention that the IRS did not act on their request for an abatement of the negligence penalties or otherwise explain its refusal to abate the penalties is unavailing under the circumstances of this case.

[5] Accordingly, the decision of the Tax Court is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE
COURT